

**RE: Rule 2-200
6/10/05 Commission Meeting
Open Session Item III.I.**

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Friday, June 03, 2005 8:37 AM
To: Ethics: Rules Revision Commission
Subject: [rrc] RRC - Rule 2-200 - Draft 6 - 06/10/2005 Agenda Item III.I.

Greetings:

Attached is draft 6 of rule 2-200, in WP, Word and PDF, with a PDF red-line version comparing Draft 6 to Draft 5 (01-31-05), in PDF.

Below is Stan Lamport's explanatory e-mail concerning the draft.

Thanks,

Kevin

From: Lamport, Stanley W.
Sent: Thursday, June 02, 2005 7:23 PM
To: 'Audrey Hollins (E-mail)'; 'Ellen Peck (E-mail)'; 'Harry Sondheim (E-mail)'; 'Ignazio J. Ruvolo (E-mail)'; 'Jerome Sapiro Jr. (E-mail)'; 'JoElla Julien (E-mail)'; 'Kevin Mohr (Home#1) (E-mail)'; 'Kevin Mohr (Home#2) (E-mail) (E-mail)'; 'Kevin Mohr (Work) (E-mail)'; 'Kurt Melchior (E-mail)'; 'Lauren McCurdy'; 'Linda Q. Foy (E-mail)'; 'Mark L. Tuft (E-mail)'; 'Paul W. Vapnek (E-mail)'; 'Randall Difuntorum (E-mail)'; 'Raul Martinez (E-mail)'; 'Robert Kehr (E-mail)'; 'Sean SeLegue (E-mail)'; 'Anthonie Voogd (E-mail)'; 'Yen, Mary'
Subject: Rule 2-200 - Agenda Item III-I

Attached is a clean and redlined revised draft of rule 2-200, which incorporates the changes the Commission adopted at the last meeting and revised Comments [4] and [7], which the Commission directed that I go over the Jerry Sapiro. There are also formatting changes to conform to our brave new style. With respect to the revised draft there are three points to consider:

1. At this juncture I am recommending that we not change 2-200(b). Rule 2-200(b) tracks rule 1-320(B). If we retain rule 1-320(B), we should retain the same prohibition in 2-200. We received only one comment on this rule from Nancy Moore. Prof. Moore thought the second sentence in (b) contradicts the first "because even gifts made without any 'promise, agreement, or understanding' that they would be made or that there is an expectation of future referrals are still being given as a 'reward for having given a referral.'" Prof. Moore wanted the first sentence to state a general rule and the second sentence written as an exception to the general rule.

I don't read the rule the way Prof. Moore does. I read the second sentence as saying that merely giving someone who referred you business a gratuity or gift doesn't violate the rule. In other words, if my mother refers a client to me and I buy her a birthday present, I am not barred by the rule from doing so. Prof. Moore is assuming that the gift would only be given as a reward, which

is not the case. The rule pretty clearly states that the gift or gratuity cannot be given in consideration of a promise or agreement that it would be forthcoming, which would rule out a true reward.

I don't think 2-200(b) is a rule that is broke, so I don't see any reason to fix it. However, if we change the corresponding provision in 1-320(B), we should revisit this rule as well.

2. Comment [4] reflects what Jerry and I agreed should be submitted to the Commission; however, Jerry asked me to note the issues he raised on this Comment and Comment [7].

With respect to Comment [4], Jerry had a concern that the first of the three enumerated items ("whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee") should be separated into two enumerated items. His concern is that the two concepts in the item are not true opposites - the lawyer being retained could be appropriate and willing to divide the fee.

My point is that Comment [4] explains why the consent requirement has changed in the rule. The client concern at the outset is that the client may be getting a lawyer only because of that lawyer will agree to a division and not because the lawyer is appropriate for the matter. It may not be a concern in every case, but it is one of the reasons why consent up front is required. My concern is that deleting the second half of the item or breaking it out as a separate item loses the connection between these two concepts and waters down the point we are making. Jerry agreed that the two concepts should remain together, but wanted the Commission to be aware of the issue he had raised.

3. Comment [7] also reflects what Jerry and I discussed should be submitted to the Commission. The current rule states that the total fee to be divided must not be unconscionable. Comment [7] is drawn from the current rule and is rewritten to more generally state that lawyers cannot contract to divide or divide an illegal or unconscionable fee.

Jerry's concern is that we may be signaling that a lawyer who accepts a divided fee may be disciplined without having known that the fee was illegal or unconscionable. (Not that these are disciplinary rules mind you.) We discussed putting a knowledge standard into the Comment, but that has implications for 4-200, which doesn't currently have a scienter element.

My point is that to the extent this is a concern, it exists under the current rule with respect to the total fee to be divided. Whether it is in rule 2-200 or not, I think Jerry and I agree it is fair to say that lawyers cannot divide or contract to divide an illegal or unconscionable fee. I think Jerry and I agree that we need to tell lawyers that rule 4-200 applies. We agree the comment does that. I think we should address Jerry's concern when we get to rule 4-200.

I am hopeful we are close to the end on this one.

Stanley W. Lamport
Cox, Castle & Nicholson LLP
2049 Century Park East, Suite 2800
Los Angeles, California 90067-3284
(310) 284-2275 (direct)
(310) 277-7889 (fax)

Rule 2-200. Financial Arrangements Among Lawyers

(a) A division of a fee for legal services between lawyers who are not in the same law firm may not be made unless:

(1) The lawyers enter into a written agreement to divide the fee;

(2) At the time the lawyers enter into the agreement to divide the fee, the client has consented in writing, or as soon thereafter as reasonably practicable, the client consents in writing thereto after a full disclosure has been made in writing to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of such division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees.

(b) Except as permitted in paragraph (A) of this rule or rule 2-300, a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Comment:

[1] A division of a fee under Paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under Paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142; State Bar Formal Opn. 1994-138.

[2] Paragraph (a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm who are working jointly for a client.

[3] Paragraph (a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to that client that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the

client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] Rule 2-200 is not intended to apply to a division of fees pursuant to court order.

[6] Rule 2-200 is not intended to subject a member to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in Paragraph (a).

[7] Under rule 4-200, a lawyer cannot enter into an agreement for, charge or collect an illegal or unconscionable fee. Under rule 4-200 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

[8] Rule 2-200 differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in rule 1.5(e)(1) & (2).

Rule 2-200. Financial Arrangements Among Lawyers

~~(A)~~(a) A division of a fee for legal services between lawyers who are not in the same law firm may not be made unless:

(1) The lawyers enter into a written agreement to divide the fee;

(2) At the time the lawyers enter into the agreement to divide the fee, the client has consented in writing, or as soon thereafter as reasonably practicable, the client consents in writing thereto after a full disclosure has been made in writing to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of such division; and

(3) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees.

~~(B)~~(b) Except as permitted in paragraph (A) of this rule or rule 2-300, a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Discussion

Comment:

[1] A division of a fee under Paragraph ~~(A)~~(a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria ~~that may constitute~~ for determining whether a division of a fee under Paragraph ~~(A)~~(a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142; State Bar Formal Opn. 1994-138.

[2] Paragraph ~~(A)~~(a) is intended to apply to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of ~~a contingency fee or other~~ any fee paid to another lawyer who is not in the same law firm. Paragraph ~~(A)~~(a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm who are working jointly for a client.

[3] Paragraph ~~(A)~~(a) is intended to require both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the rule.

[4] Paragraph (a)(2) ~~The requirement for full disclosure to the client in Paragraph (A)(2) includes the identity of the lawyers who are parties to the agreement to divide the fee and the share of the fee each lawyer will receive.~~

~~[5] Paragraph (A)(2)~~ requires lawyers to make full disclosure to the client and obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to that client that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining ~~the best a~~ lawyer appropriate for the ~~work~~ client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

~~[6]~~ 5 Rule 2-200 is not intended to apply to a division of fees pursuant to court order.

~~[7]~~ 6 Rule 2-200 is not intended to subject a member to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in Paragraph ~~(A)-(a)~~.

~~[8] With respect to the fee that is subject to the division, lawyers are required to comply with rule 4-200 regarding illegal and unconscionable fees~~

[7] Under rule 4-200, a lawyer cannot enter into an agreement for, charge or collect an illegal or unconscionable fee. Under rule 4-200 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

~~[9]~~ 8 Rule 2-200 differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer ~~or~~, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in rule 1.5(e)(1) & (2).